Filed 12/30/04 P. v. Christopher CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. ANDRE LEROY CHRISTOPHER, Defendant and Appellant.	C045572 (Super. Ct. Nos. CM018070, CM017639, CM018883)

Andre L. Christopher, sentenced to prison for six years for narcotics and theft offenses, argues the trial court should have requested a diagnostic evaluation prior to sentencing (§ 1203.03, subd. (a) (§ 1203.03(a)); undesignated section references are to the Penal Code), granted his right to allocution at sentencing, committed him to the California Rehabilitation Center (CRC), and granted a jury trial on the facts used to impose the upper term sentence. For the reasons stated below, we conclude a section 1203.03(a) evaluation was unnecessary; defendant's right to allocution was honored; commitment to CRC was properly denied because of excessive

criminality; and imposition of the upper term did not require a jury trial. Therefore, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On July 26, 2002, an Oroville police officer was dispatched in response to a "verbal disturbance" at a residence from which defendant would not depart. During a consensual search of defendant's duffle bag, the officer discovered 11 tablets of Oxycotin for which defendant did not have a prescription. As a result, defendant was charged with possession of a controlled substance. (Health & Saf. Code, § 11350, subd. (a)--Count 1 in Butte County case No. 17639.)

On August 10, 2002, defendant rented a generator valued at $1,400 from Gilb's Rentals. Defendant left a blank (but signed) check with Pete Gilb. When defendant failed to return the generator as agreed, Gilb checked with defendant's bank and discovered the account had been closed in early August 2002 because defendant had written over $5,000 worth of bad checks on the account. As a result, defendant was charged with obtaining money or property by false pretenses. (§ 532, subd. (a)--Count 3 in Butte County case No. 18017.)

On October 3, 2002, Charlotte Gable saw defendant open the passenger door of her vehicle, take her purse, close the door and walk away. Gable confronted defendant, and asked him what he was doing with her purse. Defendant replied, "I'm sorry, I thought this was somebody else's," dropped the purse, and walked away. As a result of this incident, defendant was charged with petty theft with a prior. (§ 666--Count 2 in Butte County case

No. SCR 37069.)

On October 18, 2002, defendant was searched in connection with an arrest warrant and found to possess a number of items taken from a stolen vehicle. Defendant was charged with receipt of stolen property. (§ 496, subd. (a)--Count 1 in Butte County case No. 18070, and Count 1 in Butte County case No. SCR 37069.)

Pursuant to a negotiated agreement, defendant pled no contest to the above offenses with a *Harvey*[1] waiver on condition that other criminal charges would be dismissed and the maximum period of confinement would be six years. Defense counsel mentioned that during plea negotiations defendant had requested that he be confined at Atascadero State Hospital or committed to CRC. Counsel had informed defendant that it was unlikely the court would make such an order but that the court would probably recommend that defendant receive mental health treatment if committed to prison. Defendant personally addressed the court and stated that he suffered from mental health problems and that he was "self-medicating" while he was "out on the street," but that his parole agent did not think he would be committed to CRC. The court stated it would "review this at the time of sentencing when I have a probation report and take that into consideration."

At the sentencing hearing, defense counsel asked that defendant be placed on probation and be permitted to enroll in a

---

[1] *People v. Harvey* (1979) 25 Cal.3d 754, 758.

residential drug treatment program to alleviate the "underlying problem" of defendant's substance abuse. Counsel noted that defendant had never received treatment for this problem, and "[a]s a long time addict, he is not able to adequately address it on his own, but with the supervision of this court, and probation, he believes that he can be a success and follow the law, and not come back before this court again."

The court then granted defendant's request to address the court personally. Defendant said: "Your Honor, the last time I seen my doctor in Yuba City, it was the second time that I appeared in front of the neurologist with alcohol on my breath, and he was giving me the pain pills. That was probably early January of 2002, something like that. [¶] By that time, when I got no more pills, I was hooked. I had no money to go out and buy Medi-Cal. My Social Security is not paying for it. I had no other choice but to do what I had to do. I thought at that time I had to do what I had to do. I was addicted to Oxycotin. I am sorry."

The court asked: "Did you figure you had to steal things?"

Defendant responded: "Sir, that's--Oxycotin--20 milligrams is $2 a piece on the street. As I wrote in the letter to you, I was probably doing 10 to 11, 20 milligrams a day; that would make $20 to $30 a day. That's what I was trading sometimes. I would do all kinds of things. I made a lot of mistakes, Your Honor. [¶] I have got 560 something days actual, Your Honor, for my credit. I have that much. I will wager every bit of that with a Johnson. I can make a program. I will stay in a

program for two years, three years. You have been square with me. I would like to show you. I will do a Johnson waiver. I will waive it all. I am not going to run. [¶] I want to change to be able to show you that I can make probation, and that's a lot of time to give up, Your Honor, and you know that. And I can get 33 percent in the prison system, so I only have to do 16 months. [¶] If I go to a program, I will stay 18, 24 months, I don't care. I will make it, and I want to make it. I got addicted to Oxycotin. I don't have the money like some of these people have to buy big lawyers to go to a 30 day dry out programs. [*Sic*.] I am willing to do what you put on me, Your Honor. I am sorry. Thank you."

Following a colloquy between counsel and the court, defendant again addressed the court, stating: "Your Honor, if I couldn't get probation, I have been in contact with CRC. They will accept me. The parole department has talked to me and told me they would accept me. And after CRC, they have a 6 month required Skyway House program that I must go to. That's 18 months right there. That in itself is what I would do if I went to prison, with the level 1 status and everything, and the 33 percent that went through. [¶] I would like to show you and some of these that have known me for a while--that's why I will wager what I have to wager because I don't run, Your Honor. You know that. One mess up--it will be done, and I will have to go the full time. Like I said, CRC, I have been in contact with them. I have a letter. Thank you very much."

The court then imposed sentence, stating: "All right. Court is going to deny probation in this matter. The defendant is eligible only in the unusual case. And the court, after examining the facts and circumstances of this case, finds that this is not an unusual case. It's a very typical case, in fact, of a person who becomes addicted to drugs, who has an underlying propensity to steal and cheat, and has done so even before you started using Oxycotin. [¶] The drugs may have exacerbated that character defect, but nevertheless I have seen you in court so many times, I can't count on two hands how many times you have been in here. And every time, you give me the same situation, same story, that you are going to reform, that you are going to do better, and that I should give you a chance. [¶] I am afraid that you just ran out of chances, []. You will be sentenced to the Department of Corrections. Court finds that the aggravating circumstances of your prior prison term, increasing seriousness of your crimes, the fact that there were multiple victims, and the fact that you committed these crimes, most of them, while I released you out on bail or OR, outweighs any mitigating circumstances."

The probation report listed well over two dozen convictions (and many parole violations) for defendant (who was 50 years old at the time of sentencing in 2003) dating back to 1970, including felony convictions for false imprisonment (§ 236) in 1979, burglary (§ 459), and being a felon in possession of a firearm (§ 12021, subd. (a)) in 1989, and receiving stolen property (former § 496.1) in 1994, in addition to the present

convictions. The report also detailed defendant's use of drugs and alcohol, including consuming several drinks per day commencing in 1966, using an "8-ball" of methamphetamine weekly since 1969, monthly use of LSD from 1969 to 1983, weekly use of cocaine from 1969 to 1977, daily use of marijuana from 1974 to 1989, and daily use of Oxycotin from 2002 to the date of the offenses.

In addition to sentencing defendant to the upper term for the receiving stolen property conviction, the court imposed consecutive terms of eight months for each of the other three convictions, plus a consecutive term of one year for the prior prison term enhancement, for an aggregate prison term of six years.

The court then took up defendant's request for commitment to CRC in the following colloquy.

"THE COURT: . . . [¶] About CRC, I will hear from counsel.

"[Prosecutor]: Your Honor, if I could interject? I seriously doubt the defendant would be accepted into CRC, due to his excessive criminality.

"THE COURT: I am not inclined to send him there, but I will give counsel an opportunity to talk.

"[Defense Counsel]: In repeatedly talking to [defendant]--and I will let him address the court on that, because he has indicated to me that if the court does deny probation, he would ask that the court send him to CRC for the reasons he's already stated.

"THE COURT: I am going to deny that request."

After advising defendant of his right to appeal, the court added that, "the court is going to recommend that the Department of Corrections provide [defendant] with mental health treatment while he's at the Department of Corrections." The abstract of judgment accordingly includes an order that defendant receive mental health treatment while imprisoned.

DISCUSSION

Denial of CRC Commitment

Defendant contends that the trial court erred by declining to refer him to CRC pursuant to Welfare and Institutions Code section 3051[2] because he is a "good candidate for rehabilitation," as indicated by his acceptance into Skyway House and CRC. Defendant notes that the court did not articulate its basis for denial of commitment to CRC, but probably did so on the basis of excessive criminality, even though, in defendant's view, "there was no determination below whether [defendant]'s primary problem was drug abuse or criminal

---

[2] This section states in part: "Upon conviction of a defendant for a felony, or following revocation of probation previously granted for a felony, and upon imposition of sentence, if it appears to the judge that the defendant may be addicted or by reason of repeated use of narcotics may be in imminent danger of becoming addicted to narcotics the judge shall suspend the execution of the sentence and order the district attorney to file a petition for commitment of the defendant to the Director of Corrections for confinement in the narcotic detention, treatment, and rehabilitation facility unless, in the opinion of the judge, the defendant's record and probation report indicate such a pattern of criminality that he or she does not constitute a fit subject for commitment under this section."

orientation." Relying principally on *People v. McGinnis* (2001) 87 Cal.App.4th 592 (*McGinnis*), defendant contends the court's analysis of the issue of CRC commitment was inadequate in light of defendant's "long-term drug problems and clear addiction, the absence of prior rehabilitation treatment, his amenability to treatment, and his acceptance as an 'appropriate subject' in one rehabilitation program."

Consideration of a Welfare and Institutions Code section 3051 request involves a two-step process. (*People v. Granado* (1994) 22 Cal.App.4th 194, 200 (*Granado*).) First, the court determines whether the defendant "'may be addicted or by reason of repeated use of narcotics may be in imminent danger of becoming addicted to narcotics . . . .' Second, if the court makes the preliminary determination of addiction or imminent danger thereof, the court must either suspend execution of sentence and order initiation of CRC commitment proceedings or find the defendant unfit for such commitment.

As to the second step of the process, case law establishes that "excessive criminality is the *only* consideration a sentencing court should look to for refusing to initiate CRC proceedings." (*Granado, supra,* 22 Cal.App.4th 194, 200.) In making that determination, the court considers the defendant's prior convictions, prior performance on probation and parole, as well as the nature and seriousness of the current offenses. (*People v. Cruz* (1990) 217 Cal.App.3d 413, 420.)

In *McGinnis*, *supra,* 87 Cal.App.4th 592, Division Two of the Court of Appeal, First Appellate District held that the trial

court abused its discretion by denying a CRC evaluation to the defendant because "it failed to state what it was about [the defendant's] pattern of criminal activity which rendered him unfit for CRC." (*Id.* at p. 597.) The appellate court stated, "we have little doubt [the defendant] would have been found to be entitled to a CRC evaluation" if the correct legal standard had been applied. (*Ibid.*) Reasoning that the defendant's crimes were nonviolent and performed to support his drug habit, the court concluded that the defendant was the "quintessential candidate for CRC." (*Id.* at pp. 597-598.)

In *People v. Masters* (2002) 96 Cal.App.4th 700 (*Masters*), we rejected *McGinnis, supra,* 87 Cal.App.4th 592, to the extent it requires a more exacting statement of reasons than some specification of where the trial court was looking in making its finding of a pattern of criminality. (*Masters, supra,* at p. 706.) We stated: "The important consideration for purposes of appellate review, however, is not whether the trial court uses magic words such as 'a pattern of criminality' or even whether the court itself recites on the record each and every fact in support of its sentencing choice. Rather, the important consideration is whether the record includes 'some specification of where the court was looking in making its findings of [a pattern of criminality].'" (*Ibid.*, quoting *Granado*, *supra*, 22 Cal.App.4th 194, 202-203.)

Although the trial court did not make express findings regarding defendant's request for CRC commitment, its statement of reasons made in connection with the imposition of sentence

leaves no doubt that the court denied CRC commitment due to defendant's excessive criminality, which the court expressly found predated defendant's addiction to Oxycotin. The court's statement of reasons demonstrates that it was thoroughly familiar with defendant's criminality, his addictions, and his repeated failures to rehabilitate himself, notwithstanding defendant's fairly detailed knowledge of rehabilitation programs and the criminal justice procedures, as shown by his argument to the court. It is apparent that the court had favorably entertained similar overtures in the past, with unfavorable results. The record demonstrates the judge determined defendant's main problem was a criminal tendency manifested through a pattern of criminality as opposed to a drug addiction, and on this basis commitment to CRC was properly denied. (*Masters*, *supra*, 96 Cal.App.4th at pp. 705-706; *Granado*, *supra*, 22 Cal.App.4th at pp. 202-203.)

1203.03(a) Referral

Defendant argues that the court erred by not requesting that he undergo a section 1203.03(a) diagnostic evaluation prior to sentencing.[3] Relying on *People v. Swanson* (1983) 142

[3] Section 1203.03(a) provides: "In any case in which a defendant is convicted of an offense punishable by imprisonment in the state prison, the court, if it concludes that a just disposition of the case requires such diagnosis and treatment services as can be provided at a diagnostic facility of the Department of Corrections, may order that defendant be placed temporarily in such facility for a period not to exceed 90 days, with the further provision in such order that the Director of the Department of Corrections report to the court his diagnosis and

Cal.App.3d 104, 111 (*Swanson*) and *People v. Peace* (1980) 107 Cal.App.3d 996, 1001 (*Peace*), defendant contends the court had insufficient information before it to evaluate properly defendant's substance abuse and mental condition in making its sentencing determination.

We review the failure to request a section 1203.03(a) evaluation under the abuse of discretion standard. (*People v. McNabb* (1991) 228 Cal.App.3d 462, 471.) "'Such placement is warranted where the court concludes a diagnostic study is essential to a just disposition of the case. The sentencing court abuses its discretion in ruling on a particular matter only where such ruling exceeds the bounds of reason.' [Citations.]" (*People v. Myers* (1984) 157 Cal.App.3d 1162, 1169.)

In *Swanson, supra,* 142 Cal.App.3d 104, and *Peace*, *supra,* 107 Cal.App.3d 996, no error was found based on the failure to request a section 1203.03(a) evaluation because the sentencing court already had before it substantial information regarding the defendant's condition. The same is true in the present case. The probation report detailed defendant's alcohol and drug usage from youth, and the court's comments at sentencing reveal it was thoroughly familiar with defendant's history. While it is true that defendant's mental health was not explored in the probation report, the court was aware that defendant

---

recommendations concerning the defendant within the 90-day period."

needed mental health treatment because it recommended that he receive such treatment while imprisoned. The court's comments at sentencing make clear that it considered a prison commitment to be the only viable sentencing choice in light of defendant's ongoing criminal activity, notwithstanding repeated grants of probation and promises to rehabilitate. Faced with imprisonment, defendant again claimed he was a prime candidate for mental health treatment and rehabilitation, but the court properly concluded that defendant's criminality had spanned a lifetime and that a prison commitment was warranted. In these circumstances, a section 1203.03(a) report would not have affected the disposition of the case, so the failure to request it was not an abuse of discretion.

Allocution

Defendant proposes that the court denied his right of allocution at sentencing when it denied his request to address the court personally regarding his request for CRC commitment. The record shows otherwise.

Since early times, courts have been required to inquire, following conviction but before imposition of sentence, whether the defendant has anything to say as to why judgment should not be pronounced. (See *United States* v. *Behrens* (1963) 375 U.S. 162, 167 [11 L.Ed.2d 224, 228]; *People* v. *Walker* (1901) 132 Cal. 137, 140-141; 113 A.L.R. 821.) In California, the right of

allocution is codified in sections 1200 and 1201.[4] (*People* v. *Cross* (1963) 213 Cal.App.2d 678, 681.) Implicit in this inquiry is a right of the defendant to respond. Since the statute limits allocution to this formal inquiry, any further opportunity for the defendant to personally address the court at sentencing is at the discretion of the court. (*Id.* at pp. 681-682.)[5] Thus, it has been held repeatedly that where a defendant is represented by counsel, the trial court need only give *counsel* an opportunity to address the court before sentencing. (See *People* v. *Sanchez* (1977) 72 Cal.App.3d 356, 359; *People* v.

---

[4] Section 1200 provides: "When the defendant appears for judgment he must be informed by the court, or by the clerk, under its discretion, of the nature of the charge against him and of his plea, and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him." Section 1201 reads: "He or she may show, for cause against the judgment: [¶] (a) That he or she is insane . . . . [¶] (b) That he or she has good cause to offer, either in arrest of judgment or for a new trial . . . ."

[5] We are unpersuaded by defendant's reliance on *In re Shannon B.* (1994) 22 Cal.App.4th 1235, for the proposition that the court has no discretion to deny a defendant's right to address the court personally at sentencing. In that case, the court traced the history of the right of allocution from its English roots and suggested *People* v. *Cross*, *supra*, 213 Cal.App.2d at pages 681 through 682 and its progeny were wrongly decided and that the defendant himself must be permitted to address the court. (*In re Shannon B., supra,* 22 Cal.App.4th at pp. 1239-1246.) *In re Shannon B.,* however, involved a juvenile wardship proceeding in which the court concluded the right of allocution is superfluous where the juvenile already enjoys a statutory right to address the court at the dispositional hearing. (*Id.* at p. 1247.) Hence, its discussion of allocution rights in a criminal case is dictum, which we decline to adopt.

Wiley (1976) 57 Cal.App.3d 149, 166; *People* v. *Cross, supra,* 213 Cal.App.2d 678, 681-682.)

Both defendant personally and his counsel were given ample opportunity to address the court regarding defendant's sentencing and potential commitment to CRC. Defendant filed a letter to the court that was included in the probation report, spoke to the probation officer, addressed the court at length regarding sentencing and, through counsel, argued for probation, CRC commitment, or a mitigated prison term.

With respect to CRC commitment, defense counsel did not even make a formal request that defendant be permitted to address the court. Counsel stated: "In repeatedly talking to [defendant]--and I will let him address the court on that, because he has indicated to me that if the court does deny probation, he would ask that the court send him to CRC for the reasons he's already stated." This statement was, at best, an entreaty to the court to hear further from defendant on the same issue to which he had already spoken and, according to counsel, to say the same thing he had already said. In these circumstances, the court was not obliged to hear defendant repeat his argument, and the summary denial of counsel's request worked no injustice. Defendant's claim to the contrary is meritless.

Blakely Error

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*)

that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely v. Washington* (2004) 542 U.S. ___, ___ [159 L.Ed.2d 403, 413-414] (*Blakely*).)

Relying on *Apprendi, supra,* 530 U.S. 466, and *Blakely, supra,* 542 U.S. ___ [159 L.Ed. 2d 403] defendant claims the trial court erred in imposing the upper term on the receiving stolen property conviction because the court relied upon facts not submitted to the jury and proved beyond a reasonable doubt, thus depriving him of the constitutional right to a jury trial on facts legally essential to the sentence.

The contention fails. One of the reasons the trial court gave for imposing the upper term for the receiving stolen property conviction was defendant's prior criminal convictions. (Cal. Rules of Court, rule 4.421(b)(2).) As we have noted, the rule of *Apprendi* and *Blakely* does not apply to a prior conviction used to increase the penalty for a crime. Since one valid factor in aggravation is sufficient to expose defendant to the upper term (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433),

the trial court's consideration of other factors, in addition to the prior conviction(s), in deciding whether to impose the upper term did not violate the rule of *Apprendi, supra,* 530 U.S. 466, and *Blakely, supra,* 542 U.S. ___ [159 L.Ed. 2d 403].

Defendant also claims the trial court erred in imposing consecutive sentences on the remaining counts. This contention also lacks merit as a result of defendant's plea bargain, which specified that he could receive a six-year prison sentence. Plea bargaining is a judicially and legislatively recognized procedure (*People v. Masloski* (2001) 25 Cal.4th 1212, 1216; § 1192.5) that provides reciprocal benefits to the People and the defendant. (*People v. Orin* (1975) 13 Cal.3d 937, 942.) When, as part of a plea agreement, a defendant specifies the maximum sentence that may be imposed, he necessarily admits that his conduct is sufficient to expose him to that punishment and reserves only the exercise of the trial court's sentencing discretion in determining whether to impose that sentence. (See *People v. Hoffard* (1995) 10 Cal.4th 1170, 1181-1182.) The decisions in *Apprendi, supra,* 530 U.S. 466, and *Blakely, supra,* 542 U.S. ___ [159 L.Ed.2d 403], do not preclude the exercise of discretion by a sentencing court so long as the sentence imposed is within the range to which the defendant was exposed by his admissions. Such is the case here. Defendant's plea in effect

admitted the existence of facts necessary to impose consecutive sentences.[6]

DISPOSITION

The judgment is affirmed.

SIMS, Acting P.J.

We concur:

NICHOLSON, J.

ROBIE, J.

[6] The plea bargain provides an alternative ground for rejecting defendant's challenge to the upper term on the receiving stolen property conviction, and we so hold.